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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 503

BEAR SALES COMPANY, A CORPORATION, AND E. ROBERT BAER, INDIVIDUALLY AND AS AN OFFICER OF SAID CORPORATION,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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August 19, 1966.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Bear Sales Company and E. Robert Baer, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit. The opinion and order of the Court of Appeals were rendered on June 1, 1966, and a final decree was entered on June 29, 1966.

OPINIONS BELOW.

The court below affirmed an order to cease and desist entered by the Federal Trade Commission (hereinafter the "Commission") because of an alleged violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat.

719 (1914) as amended, 15 U. S. C. Section 45(a)(1) (1958).

The Initial Decision of the Hearing Examiner is appended hereto as Appendix A. The Commission's order and its opinion, adopting the Initial Decision but slightly modifying the order of the Hearing Examiner, are appended hereto as Appendix B. The opinion of the Court of Appeals affirming the Commission, not yet reported, is appended hereto as Appendix C.

JURISDICTION.

The order denying rehearing and the final decree of the Court of Appeals are appended hereto as Appendices D and E. The order denying rehearing was entered on June 30, 1966, and the final decree was entered on June 29, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1) (1958).

QUESTIONS PRESENTED.

1. Is the Commission's finding that petitioners' acts and practices are unfair within the meaning of Section 5 of the Federal Trade Commission Act arbitrary, capricious and an abuse of discretion and in violation of the Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U. S. C. Section 1009(e) (1964 Ed.), because said finding is unsupported by substantial evidence, and is contrary to the evidence in the record, and ignores the environmental and marketing context in which said acts and practices occurred?

2. Is the Commission's conclusion that petitioners' sales plan constitutes unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, erroneous in that it discriminates against

small businessmen, denies buyers the freedom of choice, and is refuted by modern marketing principles?

3. Did the Commission in formulating its decision in the case at bar erroneously rely on the case of *Federal Trade Commission* v. *Keppel Bro. Inc.*, 291 U. S. 304, which involved a completely different state of facts than the present case and is therefore not applicable here?

4. Did the Commission err in concluding that the practices of the petitioners are against the public policy of the United States?

5. Did the Commission lack jurisdiction for failure to show that the proceeding in the case at bar was in the interest of the public, as required by Section 5(b) of the Federal Trade Commission Act?

STATUTES INVOLVED.

The statute involved in this case is Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719 (1914) as amended, 15 U. S. C. Section 45(a) and (b) (1958), which in pertinent part provides that:

> "(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."
>
> "(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."
>
> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive acts or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue and serve upon such person, partnership or corporation a complaint

stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint." (Emphasis supplied.)

Another statute which is involved in this case is the Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U. S. C. Section 1009(e) (1964 Ed.), which provides in part as follows:

"Scope of review (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency actions, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Also involved is Rule 19 of the Rules of the Supreme Court of the United States, which provides in part as follows:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and *important reasons* therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . . (b) Where a court of appeals . . . has decided *an important question of federal law which has not been, but should be settled by this court; . . .*" (Emphasis supplied.)

STATEMENT.

The petitioner, Bear Sales Company, is an Illinois corporation with its principal place of business in the City of Chicago. The petitioner, E. Robert Baer, is an officer of the corporate petitioner and he directs and controls the acts and practices of the corporate petitioner.

In 1964 the Federal Trade Commission issued a complaint (R. 2) charging the petitioners with unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, through use of lottery schemes or games of chance in the sale and distribution of their merchandise. The complaint charged that the petitioners were engaged in the sale in interstate commerce of broiler-toasters and other articles to the public and to stimulate the sale of said merchandise the petitioner supplied to the public push cards and instructions describing how the merchandise might be awarded to purchasers of chances on said cards as prizes as well as to the sellers of said chances and thus the merchandise be sold and distributed to the public by means of a lottery scheme or game of chance. The complaint alleged that said practice is contrary to the established public policy of the government of the United States and is unfair.

The petitioners filed an answer denying that their sales of merchandise constitute sales of merchandise by means of a chance or gaming device and that their practices are contrary to the established public policy or are unfair within the meaning of the Federal Trade Commission Act and alleging that their practices are not inconsistent with the standards of fair dealing of contemporary business practices and public behavioral norms. (R. 8.)

Prior to the hearing in this case petitioners and the attorney for the Federal Trade Commission stipulated that

the petitioners are in the business of selling and distributing to the public various articles of merchandise, that they have mailed their advertising material from Chicago into various other states and that this material includes letters, advertising material, order forms, return envelopes and punch cards.

The hearing in this case was held at Indianapolis, Indiana. Carolyn Lahey and Elizabeth Johnson testified for the Commission that they had received advertising literature from the Bear Sales Company, that they had sold the chances, many of them to members of their own family (R. 30, 33, 34, 37, 39), and that they had received the merchandise. There was no complaint made about the quality of the merchandise. Elizabeth Johnson had sold many of the chances to her mother, the mother had purchased the name under the seal, and both she and her mother had received Rose Lamps. (R. 37.) Carolyn Lahey and a member of her family had each received broiler-toasters. (R. 31, 34.) Both witnesses were adults, and neither testified that they had sold any chances to children or minors. This concluded the Commission's case.

Petitioners then offered in evidence their Exhibit 1 which is a release from the American Institute of Public Opinion concerning a poll conducted by George Gallup on the question of whether people favored state-operated lotteries to help pay the cost of government. It was stipulated that this poll had been taken by the American Institute of Public Opinion, that this Exhibit is a true and correct copy of the Institute's report on the results of the poll, and that the Exhibit might be received in evidence as such. (R. 48.)

An examination of this Exhibit indicates that this sampling of public opinion establishes a majority of the public as being in favor of the operation of lotteries or sweepstakes by the state government to help pay the cost of government. (Pet. Exh. 1.)

Petitioners then requested that judicial notice be taken of the following state statutes. The United States Supreme Court in *Federal Trade Commission* v. *Keppel & Co.*, 291 U. S. 304, based its decision on the belief that use of the element of chance in selling had long been condemned by the criminal statutes and common law, and these statutes indicate that the trend since said decision is toward the legalization of gambling.

(1) Section 7952, Unconsolidated, Book 65 of McKinneys Consolidated Laws of New York Annotated, as declaring legal pari mutuel betting on horse races, and Section 487, Book 23, as legalizing Bingo.

(2) Title 5:8-25 and 5:8-51 of New Jersey Statutes Annotated, as authorizing and legalizing Bingo and raffles.

(3) Section 284.34 of New Hampshire Revised Statutes Annotated, as declaring pari mutuel betting on horse races legal, and Chapter 287, as legalizing Bingo.

(4) Section 550.16 of Florida Statutes Annotated as legalizing pari mutuel betting on horse races, dog races and Jai Alai.

(5) Section 19594 of Deering California Codes on Businesses and Professions, as legalizing pari mutuel betting on hore races. The playing of draw poker in draw poker clubs has also been legalized in California.

(6) Section 3769.08 of Pages Ohio Revised Statutes Annotated, as legalizing pari mutuel betting on horse races.

(7) Section 436480 of Baldwin's Kentucky Revised Statutes Annotated, as legalizing pari mutuel betting on horse races.

(8) Article 788 of the Annotated Code of Maryland, as legalizing pari mutuel betting on horse races.

(9) Title 28, Sections 361 and 551 of the Delaware Code Annotated, as legalizing pari mutuel betting on horse races.

(10) Chapter 8, Section 37j, of Smith Hurd Illinois Statutes Annotated, as legalizing pari mutuel betting on horse races. The old gambling statute, Chapter 38, Sections 121b and 344, which prohibited punchboards under certain conditions, and the new Chapter 38, Section 28-1 which replaced them in 1961 and which does not prohibit or even mention punchboards.

(11) Section 464.050, Volume 4, Revised Statutes of Nevada, as permitting various forms of gambling under license.

(12) Title 18, Section 4699.5, Pennsylvania Statutes, as legalizing betting on horse trotting races given regularly incorporated trotting associations.

(13) Section 11-19-30, General Laws of Rhode Island, as permitting various organizations to operate Bingo games, and Section 41-4-2, as authorizing betting on horse races on the pari mutuel system.

(14) Chapter 5305, South Dakota Code, as authorizing horse races and betting thereon under the certificate system.

(15) Volume 8, Chapter 24, Section 94-2401, Revised codes of Montana, as authorizing organizations, drug stores and other places of business to maintain card games for their members or customers and "trade stimulators" such as "pull boards" and other boards, where the board's return does not exceed the retail price of the prize. Also Section 94-2425 as legalizing betting on horse races.

In all, some 24 states have legalized gambling in some form.

Arno K. Kleimenhagen, Professor of Marketing at the University of Wisconsin—Milwaukee, testified on behalf of the petitioners that he holds a Master of Business Administration degree, has engaged in extensive research in marketing and acts as a consultant on marketing problems for various business firms. He described the business of the Bear Sales Company as satisfying the wants, needs, and desires of a portion of the consuming public, including the desire for curiosity, novelty, hope, and amusement. (R. 55.)

He stated that the plan does not create the wants but the these wants are already existent in the individual. (R. 55.) Other products, services and methods of distribution also cater to the desire for hope and amusement, such as cosmetics, hair restorers, dance lessons, movies, television and magazines. (R. 56.) In modern marketing theory we choose now to be consumer oriented rather than product oriented. The consumer has various needs, wants and desires which can be satisfied with products through various means of distribution and sales promotional devices. (R. 58.)

Petitioners offered its Exhibits 2 through 15 to indicate the type of sales techniques employing prizes and the element of chance, used by the advertisers of many well known products. Exhibits 2-A and 2-B are an advertisement of the Longines Symphonette Recording Society, giving members of the public the chance to participate in a sweepstake drawing with over one hundred thousand prizes, including one hundred Mustang automobiles, if they will order a $9.95 album of records on a free ten day trial.

Petitioners' Exhibit 3 is an advertisement of Domino Sugar offering a free trip to Washington to the winner of a contest in which it is necessary to complete a sentence. To enter, it is necessary to purchase a bag of sugar to get an entry coupon and to send in 50¢ for copies of four historical documents.

Petitioners' Exhibit 4 is an advertisement offering persons a chance to participate in a sweepstake drawing for a prize of $25,000.00. Persons can enter by use of an entry blank on the back of any label from 46 ounce cans of Hi-C fruit juices or on a plain sheet of paper or the entry blank which appears in the advertisement.

Petitioners' Exhibit 5-A offers the public the chance to win a trip to the World's Fair and $5,000.00 in cash by completing a contest jingle. Each entry must be accompanied by three bottle cap liners from bottles of Coca Cola, the advertiser. Petitioners' Exhibit 5-B is a lucky bingo card and 5-C is an advertisement of Kraft's Hundred Thousand Dollar Fresh Fruit Bingo. The winner is determined by chance.

Petitioners' Exhibit 6 is an advertisement by the Airstream Trailer Company of its Fabulous Annual Sweepstakes. To compete it is necessary to buy an Airstream Trailer and then set forth in fifty words the reasons for the purchase. Prizes include a refund of the purchase price of the trailer, a 1965 Oldsmobile and others.

Petitioners' Exhibit 7 is an announcement of the Smith-Corona Marchant Sweepstakes, offering various business machines of the advertiser as prizes, the winner to be determined by electronic computer.

Petitioners' Exhibit 8 offers $10,000.00 in cash prizes in the Kraft Shopping Spree Sweepstakes. To enter it is necessary to purchase a package of Kraft margarine and the winner is selected by a drawing.

Petitioners' Exhibit 9 is an advertisement of Baggies $250,000.00 Holiday Food Sweepstakes. To enter it is necessary to get entry blanks from food stores or from Baggies and the winners are selected by drawing.

Petitioners' Exhibit 10 is an advertisement of Glad Bags Match-The-Stencil Sweepstakes. There are a thou-

sand prizes of $100.00 each and the advertisement contains a stencil which the person is advised to take to his store to see if it matches the name on the containers of any Glad products.

Petitioners' Exhibit 11 is an advertisement by Procter and Gamble of its Fabulous Florida Fiesta Contest, offering 1030 prizes, including five beautiful homes. To enter it is necessary to purchase certain Procter and Gamble products.

Petitioners' Exhibit 13 is an advertisement of the Merit Furniture Company giving the public a chance to win a door prize by attending a furniture sale.

Petitioners' Exhibit 14 is an advertisement of the Wisconsin Men's Apparel Club offering the people who register at a clothing sale a chance to win valuable prizes.

Petitioners' Exhibit 15 is an advertisement by the Niss Furniture Company, offering prizes of $3,000.00 in a jingle contest. To compete it was necessary to submit an entry blank obtained either from newspaper advertisement or one of the four stores of the advertiser.

Professor Kleimenhagen then described various sales stimulating plans which are in common use throughout the United States. In the plan called the Dutch Auction the seller places a price on an item. If it is not sold during that day, he will cross out the original price and place a lower price on the article. Again, if the article is not sold, the price is reduced. The element of chance enters because the buyer gambles on how low the price will go before someone else will buy. (R. 79, 80.)

The George Washington Day Sale features a limited number of items offered at a ridiculously low price. The first one to visit the store has the opportunity to buy these several items at that low price. (R. 81.)

In the chance discount technique the customer purchases

an article and then is given an opportunity to break a balloon which contains therein a discount, which may run anywhere from ten percent down to zero. (R. 81.)

Many firms use red stars on cash register tapes. When a red star shows up on a cash register tape the customer either receives his purchases free or receives a prize. (R. 81, 82.)

Another device is the alarm clock ring. When the ring occurs those persons making purchases receive their purchases free or receive a prize. (R. 82.)

In the bean count the store features a glass jar full of beans or other items, and the customer who guesses closest to the correct number in the jar wins a prize. (R. 82.)

In the hostess plan of selling the company attempting to sell goods normally give a prize to the hostess. (R. 82.)

In these various sales plans the element of chance plays an important part and many customers receive items of value for no or very little consideration. (R. 83.)

In the recent Pepsi-Cola Million Dollar Shopping Spree Contest there were over 61 million entries. Persons who entered got their entry blanks from Pepsi-Cola cartons. (R. 83.)

All of these plans of merchandising may be described as games of chance or gift enterprises. (R. 84.) Petitioners' method of sales is very similar to these other plans and contests used by reputable companies. (R. 84.) All of them give to the prospective customer, in addition to the products themselves, the elements of curiosity, novelty, hope and amusement, satisfying the customers' wants in that respect. (R. 85.)

Professor Kleimenhagen declared that the practices of the petitioners are not beneath the level of prevailing practices in the field of merchandising but that the petitioners are following some of the present practices in distributing

products, in other words, responding to the demand of the market place. Petitioners' method of merchandising has value in stimulating the sale of goods generally in this country, expanding the total sales of such products in the economy. (R. 85, 86.)

Following the conclusion of the hearing the Hearing Examiner, William L. Pack, issued his Initial Decision in which he found the petitioners' practices to be unfair and in violation of the Federal Trade Commission Act. He rejected the contention that, whatever may have been the situation in the past, the use of lotteries or games of chance in the sale of merchandise is not now in contravention of public policy. He declared that the state statutes cited merely provide exceptions to the general rule against gambling and that the contests and other sales stimulating plans used by major business firms are for the most part not lotteries and any that are do not show a change in public policy.

Petitioners appealed from the Initial Decision to the Commission, and a divided Commission denied the appeal. (R. 20.) In its Opinion the Commission broadened the terms of the proposed order to include all sales involving the element of chance, not just those which are technically lotteries. (Appendix B.)

Commissioner Elman dissented:

> "Commissioner Elman dissents on the ground that there is no 'established public policy of the United States' that requires the Commission to expend its limited resources on this kind of case." (R. 20.)

Upon request of the petitioners the Court of Appeals issued an order dispensing with the necessity of printing the exhibits and permitting both petitioners and respondent to refer to the exhibits in their briefs and oral arguments.

REASONS FOR GRANTING THE WRIT.

1. Merchandising methods in the United States have undergone a tremendous change in recent years. As the record in this case demonstrates, sweepstakes and other games of chance literally permeate the business world of today. The needs of the public for the emotional experience of gaming are satisfied in combination with every conceivable product. The overwhelming consumer acceptance of this form of merchandising is indicated by the fact that a single, recent sweepstakes contest attracted in excess of 60,000,000 entrants. (R. 83.) The most honored and ethical of the merchandising giants conduct games of chance as a part of their regular business activity, demonstrating acceptance in the business community of the lottery type of sales stimulator. The petitioners now ask this Court, in the light of the documented record herein of the business environment above described, whether the Commission's finding that petitioners' acts and practices are unfair within the meaning of Section 5 of the Federal Trade Commission Act is arbitrary, capricious and an abuse of discretion.

The entire proof of the Commission consisted of nothing more than a stipulation relating to materials used by petitioners in the conduct of their business and the testimony of two consumer witnesses that they had participated in petitioners' sales plan. The Commission's case in toto was that the petitioners use push cards in the sale of merchandise. It introduced no proof whatsoever of unfairness to any segment of American society.

Petitioners' proof in support of an affirmative defense of fairness consisted of a request that judicial notice be taken of state statutes legalizing gambling, a report of a poll of United States opinion, the testimony of an expert in marketing practices and oral and documentary evidence

of practices of the merchandising giants of American business, including Longines Symphonette Recording Society, American Sugar Company, Minute Maid Company, Coca-Cola, Kraft Foods, Air Stream, Smith-Corona-Marchant Company, Union Carbide and Procter and Gamble (R. 60 to 71, incl.), which, in terms of their moral, social and economic ramifications, are indistinguishable from petitioners' condemned practices. Every plan which petitioners presented in evidence involved a prize, chance and consideration. Collectively, the comparable practices are engaged in, not merely by competitors of petitioners, but, indeed, are integrated into a broad cross-section of the American market, involve millions upon millions of dollars in prizes and millions upon millions of consumers.

As Mr. Justice Goldberg said in *Atlantic Refining Co.* v. *FTC*, 381 U. S. 357, 389, 14 L. ed. 2d 357 at 464: "When the Commission exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has (properly) exercised the discretion with which Congress has empowered it.' *Labor Board* v. *Metropolitan Ins. Co.*, 380 U. S. at 443, 13 L. ed. at 955. See *Burlington Truck Lines* v. *United States*, 371 U. S. at 167-169, 9 L. ed. 2d at 215, 216. Administrative agency action is not to be sustained where 'its explication is . . . inadequate, irrational or arbitrary. . . .' *Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221, 236, 10 L. ed. 2d 308, 319, 83 S. Ct. 1139, 94 A. L. R. 2d 1147." Later at 381 U. S. 391, 14 L. ed. 2d 465, he said: ". . . it seems obvious to me that the Commission must formulate a clear rational rule which is based on an *adequate economic explication* and takes into consideration the situation of all industry members affected by the rule." (Emphasis supplied.)

Mr. Justice Harlan, in *FTC* v. *Mary Carter Paint Co. et al.*, 382 U. S. 46, 15 L. ed. 2d 131, 86 S. Ct. 219 (1965) at 223

said: "The temptation to gloss over the analytical failings of the rationale now asserted for the FTC by relying on agency expertise must be short-lived in this case. . . . Surely there can be no resort to uninvoked expertise to buttress an unarticulated theory."

The First Circuit Court of Appeals in 1962 said: "It is clear that what is an 'unfair' method of competition can only be assayed in the environmental and marketing context of the particular practice put in issue." *Korber Hats, Inc. et al.* v. *FTC,* 311 F. 2d 358, 360.

In its opinion the Commission made no comment whatsoever regarding the "environmental and marketing context" of petitioners' practices. It made no reference to petitioners' proof of the environment and market in which it operates. *Without more,* it held that complaint counsel had proved that the practice of selling merchandise "by chance is an unfair act or practice under Section 5 of the Federal Trade Commission Act" and "contrary to the established public policy of the United States" and that petitioners had "failed to demonstrate that the public's concern with lotteries *as evidenced by the various state and federal laws* dealing with lottery and related practices had changed significantly to enable the Commission to conclude that lotteries were no longer against public policy." This is uninvoked expertise. This is unarticulated theory. This is a failure to assay the petitioners' practice in its "environmental and marketing context."

Petitioners' Practice in Its Environmental Context.

Petitioners' method of selling and distributing their merchandise is to send to members of the public advertising and sales literature, order blanks, and a device commonly called a push card. One of these cards which is typical of those used by petitioners, involves the sale of an elec-

tric broiler-toaster. The card has forty-five partially perforated discs, each of which bears a masculine or feminine name. Under each disc is a number which determines the amount to be paid by persons punching the discs. For example, the person punching the disc which has under it the number twelve pays twelve cents. The numbers are effectively concealed until the disc has been punched or separated from the card.

The card also contains a master seal under which is concealed a name corresponding to one of the names on the discs. When all of the discs have been punched, the master seal is removed and the person who has punched the disc bearing the name corresponding to that under the master seal wins the broiler-toaster. The operator of the card (member of the public to whom petitioners have sent the card) sells the chances on the card among his friends and acquaintances. After all of the chances have been sold and the money collected, the operator remits the total amount to petitioners and petitioners ship to the operator two of the broiler-toasters, one to be delivered by the operator to the person punching the lucky disc and the other to be retained by the operator as compensation for his services.

A member of the public, receiving petitioners' order blanks and push cards, can, if he wishes, purchase the item offered for sale outright. Likewise, a person who is solicited by an operator of the card can, if he pleases, refuse to participate, purchase one or more or all of the chances and, in the latter case, in fact purchase the merchandise. The two items approximate in value the total price of all of the chances on the card. The operator thereby receives a fifty per cent commission for his effort. The merchandise consists of items of interest to adults and the cards are sent to adults. There is no evidence in the record that children were involved in any way. In the instant

case there is no complaint about the merchandise or service. In each transaction a person solicited not only has the option to participate or to refuse to do so, but he knows that, if he participates, he will be purchasing a one-forty fifth chance to receive a broiler-toaster, since there are forty five discs on each card.

The record in this case demonstrates, as typical of the environmental context of petitioners' practice, the following cross-section of American business practices: a highly regarded record company which sells record albums for $9.95 and a chance to participate in a sweepstake drawing with over one hundred thousand prizes, including one hundred Mustang automobiles (R. 60); the Nation's largest sugar company which sells bags of sugar along with chances to win a free trip to Washington, D. C. (R. 61); a leading fruit juice company which sells juices along with a chance to participate in a sweepstake drawing for a prize of $25,000 (R. 61); the Nation's largest soft drink company which sells Coca-Cola along with chances to win a trip to the World's Fair and $5,000 (R. 61) and its chief competitor which sells Gola along with a chance to enter a $1,000,000 sweepstakes contest (R. 83); a ranking food company, a division of National Dairy Products, the 23rd largest corporation in the United States, which sells jellies, corn oil and margarines along with a chance to enter a $100,000 bingo game (R. 61); a company which sells bags and wrappers along with chances to enter a $250,000 sweepstake contest (R. 63) and its competitor, theNation's 26th largest corporation, which combines the sale of bags with a contest in which there are a thousand prizes (R. 63); the Nation's largest soap and detergent company which combines the sale of toothpaste, shampoo, fabric softener and detergent with a contest offering 1,030 prizes, including five homes (R. 63); a prestige travel trailer company which gives the winner of its sweepstakes contest his money back for

the trailer he must purchase to enter the contest (R. 62); and a top business machine company which offers a chance to win a business machine to those who will permit the company to demonstrate its products. (R. 62.) The details of these plans are set forth in petitioners' Exhibits 2 to 15 inclusive, which do not appear in the Record, leave having been granted by the Court of Appeals to refer to said Exhibits in briefs without printing them. Though this is but a cross-section, it comprises a large portion of the Nation's retail business and adequately demonstrates the compatibility of petitioners' practices with the environment in which they operate. The Commission's opinion wholly ignores this evidence, referring only the evidence of "state and federal laws" brought out in petitioners' proof. The Commission surely did not draw upon its expertise in commerce and its opinion must be condemned as arbitrary.

Every plan which petitioners presented involved a prize. While it is true that some of the plans allow participation without buying a product, consideration is present in each case, for as it is stated in 54 Corpus Juris Secundum 848, citing Pennsylvania, Nebraska, Massachusetts, Oregon and New Hampshire cases:

> "According to some authorities, whether a particular scheme is to be regarded as a lottery or otherwise is not to be determined by ascertaining whether anyone may possibly win a prize through the operation of the scheme without having paid for the chance to win, and a lottery may exist, although not every participant directly pays a consideration. Under this view as long as some of the participants pay for their chances, a lottery does not cease to be such merely because other, or even many, participants are permitted to play free. . . . . *consideration may consist of a benefit to the person conducting the scheme or an inconvenience or disadvantage to the promisee and hence . . . money or something of actual pecuniary value need not be given to compete.*" (Emphasis supplied.) Citing New Jersey, Wisconsin and Vermont cases.

The cost to the participant in petitioners' plan (some discs require no payment, the maximum cost to participant is 39¢) is no greater than in the other plans shown to be used by other firms, when one considers the effort those plans call for. Chance is involved in all of these plans described in the evidence. In a few instances the participant must complete a sentence with "aptness and sincerity" or put a line on the end of a jingle, but even here, the outcome is determined by the chance that someone will be pleased with the words. This subterfuge is not convincing.

There is a basic inconsistency in the Commission's position in evaluating contemporary business practices. On the one hand, it suggests that the petitioners' evaluation of other merchandising plans involving chance may not be apt because in some of the contests it may be debatable as to whether all three elements of a technical lottery are present and, on the other hand modifies the order of the hearing examiner so that it will cover plans which petitioners may use in the future that do not involve all of the technical elements of a lottery. This basic inconsistency constitutes discrimination against the small businessman attempting to compete with the merchandising methods of the giants of industry. It is unjustified administrative class legislation which works an injury upon the small businessman as well as the consuming public.

Competition today is not limited to the merits of merchandise. The small businessman *must* compete with the industrial giants not only with goods but with merchandising plans as well to succeed in satisfying the wants and needs of the consuming public. He cannot afford million-dollar shopping spree contests, he cannot give away homes, automobiles, trips abroad and furniture. His competitors with their tremendous resources can put on glamorous games of chance and induce millions to satisfy their ma-

terial and emotional needs by buying their products and participating in their games. The petitioners are confined by the Commission to selling their products on the merits alone. And why? Because the Commission refuses to perform its required function of "assaying the environment and marketing context" of petitioners' practice and arbitrarily and capriciously orders its discontinuance.

2. For too many years, the Commission has decided cases involving marketing practices without consideration of the advanced development in marketing theory and thought arising out of the extensive efforts in marketing research. The constricted view which the Commission has of the petitioners' practice is a consequence of its equally constricted view of the nature of the market place. Marketing research has firmly established that conclusions based upon the concept that persons buy goods solely because of their apparent and obvious utility are ill-founded.

Petitioners' Practice in Its Marketing Context.

F. H. Knight in his essay on "Ethics and the Economic Interpretation," in *The Ethics of Competition* (1935), p. 20, said that "Wants . . . are the common starting point of economic reasoning . . ." A primary occupation of the American public today is the translation of wants into purchases. The complex of human wants is not merely a desire for material goods or as Walter Taplin said in "Advertising: A New Approach": "lumps of stuff."

Most of the things persons want are not material. They are mental. The customer desires to have interesting experiences. There are an infinite complex of wants which become translated into purchases, for example, of face powder, arm chairs and travel aboard ships.

The consumer's problem is that of *optimum consumption* and he should have a free hand in solving his problem.

As this Court said in *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U. S. 374, 387, 13 L. ed. 2d 904, 915; 85 S. Ct. 1035, 1044 (1965): "(T)he public is entitled to get what it chooses, though the choice may be dictated by caprice or fashion or perhaps by ignorance," citing with favor *Federal Trade Com.* v. *Algoma Lumber Co.*, 291 U. S. 67, 78, 78 L. ed. 655, 662, 54 S. Ct. 315. The Federal Trade Commission injures the public when it interferes with that choice and should be required to justify any interference on solid, substantial grounds. Consumers' wants are catered to in the market place not only by the goods which are sold but by the merchandising plans themselves. Both the goods and the merchandising plan satisfy a complex of wants to each given consumer. Each individual consumer determines how he can optimize his consumption, within his means, in the market place by making a selection from the variety of goods and marketing plans available to him. The market place then becomes an expression of the collective desires of the consuming public to satisfy their wants. If the consumer's free choice is to be impinged upon and the market place is to be circumscribed, it should be done so only upon substantial evidence of public benefit. It should not be on the basis of unsupported speculation of alleged injury to the public. As Mr. Justice Harlan said in *Federal Trade Com.* v. *Mary Carter Paint Co., supra,* 86 S. Ct. at 223: "At the very least the Commission should be required to demonstrate *real* deception and *public injury* in a decision that allows the courts to evaluate its reasoning and businessmen to comply with its latest views; these standards are not met by the FTC's opinion in this case." (Emphasis supplied.) The Commission's decisions cannot be based on unsupported speculation of alleged injury to the public, as in the instant case. Such a method of dispensing justice will do more harm than good in that if will injure the consumer in his process of optimizing consumption.

The fact is that any reasonable construction of the word fairness makes it more applicable to petitioners' plan than to those of the giants of industry. There is no deception in petitioners' plan with respect to the odds involved. The odds are made known and the customer buys a definite and specified part of the plan. Modern economists would thus say there is in fact no chance involved. The "open-end" sweepstakes of the giants of industry are deceptive. They would create the impression that the chances of winning in their contests are relatively good, when the fact is that they are minuscule. Moreover, the compelling reason why this Court should find that petitioners' plan is fair in comparison with other plans is that non-participants are not required to share in the cost of satisfying the wants of participants. The cost of the contests of the merchandising giants must be shared by everyone why buys their merchandise. It is simply a part of their cost of doing business which is passed on to all consumers whether they participate in the contest or not. Petitioners' plan gives consumers a free choice. They may participate in the cost of the plan for the satisfaction of their wants if they wish or not, as they choose. They may make an outright purchase of one or two lamps or one or two broiler-toasters or purchase one or more chances. The cost of the operation of petitioners' plan is borne only by those who choose to participate. The cost of the operation of sweepstakes plans of other companies must be borne by all who consume the products. The consuming public bears the cost of these latter games of chance whether they participate or not and whether they approve of the practice or not. This is unfairness.

Petitioners' expert testified that the wants of the consuming public which are satisfied by petitioners' plan are those of curiosity, novelty, hope and amusement and that the plan does not create the wants, but that they are pre-

existent in the individual. Modern marketing theory discards the concept that the merchant creates wants. It recognizes that successful marketing consists of discovering wants and then satisfying them in the most efficient way. Modern marketing is consumer oriented, rather than product oriented and the wants, needs and desires of consumers are satisfied today not only with products, but sales promotional devices as well.

The public is in fact benefited by petitioners' plan because it provides an avenue for satisfying needs, inexpensively. It gives the public freedom of contract in determining the optimum way to satisfy their needs. It gives the small businessman the opportunity to serve the same wants as do his giant competitors.

3. The Commission erroneously relied on *Federal Trade Commission* v. *Keppel Bro. Inc.,* 291 U. S. 304, which involved a different state of facts and is not applicable here.

The *Keppel* case, 291 U. S. 304 was decided over thirty years ago. An examination of the proceedings before the Commission, the record and briefs in that case (Transcript of Record No. 194, Volume 2069 U. S. Supreme Court Records; Federal Trade Commission Docket No. 1816) discloses some very important points of difference between that case and the case here under consideration.

In *Keppel,* 291 U. S. 304, the complaint described three sales plans: (1) Purchasers of chocolates of different colored centers received larger pieces of candy free; (2) Bars were sold containing a slip of paper, specifying either a reduced price for the bar or saying "Free"; and (3) Money in the form of coins was contained in some pieces of candy. These plans were charged to divert the public to respondents' candy and to be an unfair method of competition in commerce. (Vol. 2069 U. S. Sup. Ct. Records, pp. 3, 4.)

The Commission found that some of the candy contained coins and the display card shows a picture of a school boy above this caption: "Watch this boy; he has money in his pocket." It found that another assortment was labeled "School Days 200" and offered various free candy or other premiums for chocolates with pink centers or chocolate centers as distinguished from white centers. This is the "Break and Take" method of selling candy (Vol. 2069 U. S. Sup. Ct. Records, pp. 14, 16.)

Competitors testified that many competitors regard this method of sale as morally bad and *as encouraging gambling among children, as injurious to the candy industry, and as providing merchants with the means of violating the laws of the several states.* (Vol. 2069 Sup. Ct. Records, p. 19.)

The Commission found that the break and take candies are principally sold near schools and attract the trade of school children. It was observed by a storekeeper witness that many children buy a piece of candy and throw it away or give it to others, if the center is not a prize winning color, and keep on buying until a prize is obtained or their money is gone. (Vol. 2069 Sup. Ct. Records, p. 20.)

There was evidence that the pieces of candy in the break and take package is of *poorer quality* than in straight goods assortments. *This was found to be necessary to compensate for the value of prizes or premiums distributed with the break and take goods.* It was found that many manufacturers of candy sell only straight goods candy, the sale of which has decreased, and that the sale and distribution of candy by lot and chance is against the public policy of many of the several states of the United States, and that some of said states have laws making lotteries and gaming devices penal offenses. (Vol. 2069 U. S. Sup. Ct. Records, pp. 21, 22, 23.)

The Commission in its brief filed in the Supreme Court said:

> "The particular facts here involved concern the sale by respondent, to wholesalers or retailers, of so-called penny candies so arranged in packages that the ultimate consumer, usually a child, if he makes a fortunate selection, wins a premium or prize. The evidence shows that the use of lottery devices in connection with the sale of candy diverts trade from those competitors who decline to sell lottery packages *because they are intended to appeal to the gambling instincts of children, or because the use of lottery devices is generally prohibited by law in this country, or because the use of such devices is regarded as injurious to the candy business.*" (Emphasis supplied.)

One of the Commission's three grounds for appeal, frequently repeated, is that this method is "in violation of the lottery statutes in many, if not all, of the states." (Vol. 2069 U. S. Sup. Ct. Records, p. 28) Appendix B of the Commission's Petition for Certiorari gave a list of state statutes prohibiting lotteries.

In the present case there is no evidence that the sales plan of the Bear Sales Company was aimed at children. There was no evidence of sales or purchases of chances by children. There was no evidence of the receipt of a push card by any child, and the prizes which were offered and won (by adults) were rose lamps and broiler-toasters, which would not appeal to children.

There is no showing that competitors are holding out against this sales device because they feel it is aimed at children, unlawful or harmful to the industry. There is no showing that competitors are being injured or competition is being suppressed.

There is no showing that children or anyone else were being sold merchandise of poorer or inferior quality by

petitioners, and there was no complaint of any kind about their merchandise.

There was no proof offered nor any attempt made to establish that petitioners' sales plan is prohibited by the laws of any state or by the laws of the United States.

Thus all of the elements present in the *Keppel* case (291 U. S. 304), which caused the Supreme Court to rule as it did, are absent in the *Bear Sales Company* case.

The Supreme Court found the sales device in *Keppel* (291 U. S. 304) to be against public policy because (1) it had met with condemnation throughout the community and nation, (2) it was a practice which the common law and criminal statutes have long determined to be contrary to public policy, and (3) a large share of the industry holds out against it. None of these elements have been shown to exist in this case. We urge that *Keppel* is not applicable here. The very last sentence in *Keppel* (291 U. S. 304) is:

> "New or different practices must be considered as they arise in the light of the circumstances in which they are employed."

This indicates that the Supreme Court was limiting its ruling to those situations involving the same facts as those then before it.

4. The Federal Trade Commission has, for too many years, siezed upon the phrase, "public policy," as it appears in *Federal Trade Commission* v. *Keppel & Bro., supra,* to justify its failure to perform its proper function of assaying changes in the common law, criminal statutes, public opinion, and the ever-changing business environment and the economic needs and social customs of the people. To do so, the Commission took the expression out of context and converted it into a perpetual Supreme Court mandate against the use of chance in merchandising. But no reasonable interpretation of *Keppel* permits of such a con-

struction. Mr. Justice Stone did not intend irrevocable legislation against the use of chance in merchandising. Rather, he indicated, as one of the "reasons" why "a large share of the (candy) industry (held) out against the device" (the break and take method of selling) and as the basis for a statutory construction of the method as unfair, the fact that "the practice was of the sort which the common law and criminal statutes have long deemed contrary to public policy," as the common law and criminal statutes were found by the Supreme Court to reflect public policy in 1932.

Justice Frankfurter in his book, "Felix Frankfurter Reminisces", 1962, Anchor Books, Doubleday & Co. Inc., states at page 200 that Justice Holmes and Roscoe Pound had taught:

> "* * * that law isn't something that exists as a closed system within itself, but draws its juices from life. Law being a response to life had to concern itself with life."

At page 205 Justice Frankfurter adds:

> "The law derives from facts, facts of industry and facts of life * * *"

In *Barwin* v. *Reidef,* 307 P. 2d 175, 181, 62 N. M. 183, the court said:

> "Public policy imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of the people."

In *Pendleton* v. *Greever,* 193 P. 885, 887, 80 Okl. 35, 17 ALR 317, it was held:

> "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and usages of the trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud."

Franklin Fire Ins. Co. v. *Moll,* 58 N. E. 2nd 947, 950, 951, declares:

> "Public policy is a term that is not always easy to define and it may vary as the habits, opinions, and welfare of a people may vary, and may be the public policy of one state and not be so in another."

Other decisions on the subject hold:

> "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of 'public policy' unless it clearly appear that they contravene public right or the public welfare." *Baltimore & O. S. W. R. Co.* v. *Voight,* 176 U. S. 498, 20 S. Ct. 385, 387, 44 L. Ed. 560.
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> "Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting and that freedom of contracting shall not be lightly interfered with." *State* v. *Tabasso Homes,* Del. Gen. Sess., 28 A. 2nd 248, 252, 3 Terry 110.
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> "Since the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify invalidation of contract as contrary to that policy." *Black Industries, Inc.* v. *Bush,* D. C. N. J., 110 Fed. Supp. 801, 804, 805.

In the *Keppel* case (*Federal Trade Commission* v. *Keppel & Bro. Inc.,* 291 U. S. 304) the United States Supreme Court, in condemning the break and take method of candy merchandising, mentioned its concern with the existing attitudes of businessmen. It further admonished the Commission to consider the circumstances in which business practices are employed. It is inconceivable, in the light of traditions of Anglo-American jurisprudence, that the United States Supreme Court should have intended that our dynamic American business society should be hamstrung by a stagnant and immutable concept of public policy.

5. Section 5(m) of the Federal Trade Commission Act provides that the Commission shall act "if it shall appear . . . . that a proceeding by it . . . would be to the interest of the public." This provision is jurisdictional in nature and requires a showing on the part of the Commission of injury to the public. "Even under the amended act, the jurisdiction of the commission is still based on the existence of an injury to the public, since action is authorized only if it is 'to the interest of the public.'" 65 ALR 2d 234 (1959). As Mr. Justice Harlan said in *Federal Trade Com.* v. *Mary Carter Paint Co., supra:* ". . . the Commission should be required to demonstrate real . . . public injury. . . ."

No public injury was demonstrated by the Commission in the instant case as, indeed, there could not have been. Commissioner Elman recognized this in his dissenting opinion when he said "there is no established policy of the United States that requires the Commission to expend its limited resources on this kind of case." The implications of Commissioner Elman's dissent become quite clear when one views the relationship of Federal Trade regulation and American business in its total perspective. It becomes even clearer when one considers the significance of the use of the element of chance in merchandising by small businessmen, such as petitioners, in relation to that same use employed by industrial giants. Evidently, Commissioner Elman was pointing out that the impact on the economy is negligible and upon social customs, wholly speculative. The matter is of the sort which should be resolved in the market place rather than by federal intervention.

In *New Jersey Asbestos Co.* v. *Federal Trade Commission,* 264 F. 509 (CCA-2, 1920), the Court in reversing an order of the Commission prohibiting a manufacturer from giving employees of customers or prospective customers, as an inducement to influence their employers to purchase

from respondent, gratuities such as liquor, cigars, meals, theater tickets, entertainment, etc., said: ". . . we think it would be a matter between individuals and not one so affecting the public as to be within the jurisdiction of the Commission. . . ." Without a showing of real public injury the Commission should not be permitted to usurp powers which should be reserved to the public. The market place should be the ballot box which decides which merchandising plans best serve the public interest. In a case such as this, as Commissioner Elman would suggest, the Commission should be curbed from invading the public prerogative.

The instant case should be distinguished from those which involve deception, price fixing and other matters with which the Federal Trade Commission is concerned. In a deceptive practice case, the standard of truth is ordinarily readily determinable, the alleged deception can be measured against the standard and justice rendered with certainty. Likewise, a respondent is either fixing prices or he is not and, thus, either does or does not violate a clear, statutory mandate. Public injury occurs in both cases because the market place is hampered in properly exercising its functions. But the concept of "unfair practice" is, at best, vague. In most cases, the Commission applies it properly to practices which also are deceptive, injurious to competition or discriminatory. These cases find support beyond the vague Commission's condemnation. But in the instant case, the Commission's finding of injury to the public is neither supported in reason or in fact.

CONCLUSION.

The writ of certiorari should issue.

Respectfully submitted,

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